22

DEC 20 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945. No. 601.

Elizabeth C. Lownsbury, Mrs. Evelyn H. Brantley, Richard C. Hassinger, William H. Hassinger, Mrs. Virginia H. Lange, Mrs. Leonora McCrossin, Robert Ingalls, Robert Ingalls, Jr., Ellen Gregg Ingalls, Ingalls Iron Works Company, Henry R. Howze, Alfred J. Snyder, and The First National Bank of Birmingham as:—Agent for Kate Porter Lewis, Agent for Hugh Kaul, Agent for Virginia Kaul Greene, Trustee for Crawford T. Johnson, Jr., Trustee of Estate of Nathan L. Miller, Trustee of Estate of Charles B. Patrick, Trustee for Mrs. Virginia E. Hassinger, Trustee for Virginia H. Lange, Trustee for Mrs. Leonora H. McCrossin, Trustee for Mrs. Evelyn H. Brantley, Trustee for Mrs. Lucile H. Cabaniss, Trustee for William H. Hassinger, Trustee for Richard C. Hassinger, Trustee for Hugh Kaul, Trustee for Mrs. Roy Head Kaul, Trustee for Mrs. Virginia Kaul Greene, Executor of Estate of Lafayette R. Hanna and Executor of Estate of Crawford T. Johnson,

Petitioners,

v.

Securities and Exchange Commission

and

The Commonwealth and Southern Corporation,

Respondents.

Brief in Reply to the Commission's Brief in Opposition to Petition and Motion to Defer.

ALFRED J. SNYDER,
1144 Fidelity-Philadelphia Building,
Philadelphia 9, Pennsylvania,

WILLIAM H. BRANTLEY, JR.,

LANGE, SIMPSON, BRANTLEY & ROBINSON,
1029 Frank Nelson Building,
Birmingham 3, Alabama,

ELIZABETH C. LOWNSBURY,
1144 Fidelity-Philadelphia Building,
Philadelphia 9, Pennsylvania,

Attorneys for Petitioners.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX TO BRIEF.

INDEX OF CASES.

INDEX OF STATUTES.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1945.

No. 601.

ELIZABETH C. LOWNSBURY, ET AL.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION AND THE COMMONWEALTH & SOUTHERN CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN REPLY TO THE COMMISSION'S BRIEF IN OPPOSITION TO PETITION AND MOTION TO DEFER.

ARGUMENT.

The Commission in its brief in Opposition to the Petition for Certiorari raises two contentions:

1. The Commission argues the orders sought to be reviewed are only interlocutory; hence the petition is "premature," having been taken too soon.

2. The Commission also argues that, since the orders sought to be reviewed have been modified, a review of those orders would be "moot"; hence too late.

We considered we have completely answered the first contention in our brief attached to the Petition for Certiorari; hence this brief will be directed to answering the contention of mootness and also answering the Commission's opposition to our Motion to Defer.

1. As to the Contention of "Mootness."

In our Motion to Defer we referred to certain developments in the proceedings which occurred since the decision of the Circuit Court denying a review. These facts are not in the record as it now stands before this Court. The purpose of the Motion to Defer was to afford an opportunity to bring these facts properly on the record. Counsel for the Commission oppose our Motion to Defer, yet see fit to argue from these facts. We must therefore refer to these facts as though they were on the record.

On November 1, 1945, the Commission handed down an order "modifying" its order of June 30, 1945. It should be noted this was a modification of the order, not a withdrawal. The modification ordered Commonwealth to remove a provision for a vote by the stockholders approving or disapproving the proposed plan of reorganization. All other provisions of the order of June 30th remain unaltered. The effect of the modifying order was to render the order of June 30, 1945, more objectionable than before. The Petitioners objected to the order of June 30th because it provided for approval of the plan of reorganization in a manner not in keeping with the requirement of the Certificate of Incorporation (R. 19). The modification removes even this inadequate provision for approval by the stockholders, so that the order now stands with all its objectionable features and in addition eliminates the fundamental right of a stockholder in a solvent corporation to voice his approval or disapproval of a reorganization of his company under which his contractual and property rights are to be altered. Certainly this modification by the Commission cannot be said to render our Petition moot. Its effect is to make it all the more imperative that our Petition be granted and that such arbitrary exercise of authority by a governmental agency be reviewed.

On November 9, 1945, the management of Commonwealth "acquiesced in the elimination of the provision for stockholders approval," but attached a condition that the

Commission approve certain basic changes in the plan of reorganization. The Commission has not acted upon this request, nor has it set a date for a hearing.

Certainly this action by the management of Commonwealth can not be said to affect our right to review. The order of June 30th still stands with none of its objectionable features removed and with the objectionable feature of the order of November 1st added and actually complied with by Commonwealth. Even were the Commission to approve the proposed modification of the plan it would remove only a few of the objections set forth in the Petition for Review and leave the order of June 30th standing, subject to most of the objections made in our Petition for Review. For example:

That these orders are based upon arbitrary administration of the Holding Company Act, without a full and fair hearing and contra to due process of law; (R. 18-22):

That these orders are based upon findings not supported by substantial evidence; (R. 22-25):

That these orders approve a plan of recapitalization which is not fair and equitable to the common stockholders and the holders of option warrants; (R. 26-28). It should be noted that the suggested modification of the plan still carries with it the unfair 85%-15% allocation and eliminates the option warrants without consideration:

That the orders are not authorized by the Act, or if authorized, are not within the power of Congress to regulate interstate commerce; (R. 28-29):

That the orders impair contractual obligations and deprive the Petitioners of property rights, without due process of law, in violation of the Fifth Amendment to the Constitution; (R. 29-32):

And that the orders violate the Ninth and Tenth Amendments; (R. 32-33).

Only a withdrawal of the order in its entirety could make our Petition moot. We wish we could agree with the Commission that the matter is moot, for that would

mean the order sought to be reviewed was now without any legal effect whatsoever. The Commission has the power to withdraw its order, but it has seen fit only to modify it, and then only to make it more objectionable. As the matter stands, the order of June 30th may become the basis of further proceedings and further action by the Commission. So long as this is possible the matter can not be said to be moot, since there remains a real controversy on questions vitally affecting property rights of these Petitioners.

The Petition for Certiorari presents a preliminary procedural question which has not yet been determined. If this Petition for Certiorari is denied, the Commission may disregard Commonwealth's modifications and proceed on its order of June 30, 1945, as modified, by immediate application to a District Court for enforcement. The effect of this would be to deny the Petitioners a review and nullify Section 24 of the Act in its entirety. We hesitate to think that an agency of our government would adopt such devious strategy to defeat the right of citizens, endeavoring to protect their property rights, but the possibility of such action remains, so long as the order of June 30, 1945, remains.

Had the Commission withdrawn its present order, so that the immediate controversy might have been considered moot, it would still be the duty of the Court to determine the question of our right to a review, since a similar order might and probably would be repeated. The Supreme Court in *Southern Pacific Terminal Co. v. Interstate Commerce Commission and E. H. Young* (219 U. S. 498; 31 S. Ct. 279), pointed out that the consideration of controversies involving questions of government authority should not be defeated, or a review evaded, where the order of a governmental agency is capable of repetition, or where the order may be the basis for further proceedings.

In that matter an order of the Interstate Commerce Commission required the appellants to desist from granting certain preferences for a period of two years. It was

over two years before the matter came to argument. Mr. Justice McKenna in his opinion reviewed both the facts in that case and those in several similar cases. His opinion relates so pertinently to the issue in the case at bar, that, for the convenience of the Court, that portion of the opinion follows in its entirety:

> "It will be observed that the order of the Commission required appellants to cease and desist from granting Young the alleged undue preference for a period of not less than two years from September 1, 1908 (subsequently extended to November 15). It is hence contended that the order of the Commission has expired, and that, the case having thereby become moot, the appeal should be dismissed.
>
> This court has said a number of times that it will only decide actual controversies, and if, pending an appeal, something occurs, without any fault of the defendant, which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed. Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611, and Richardson v. McChesney, decided November 28 of this term, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43. But in those cases the acts sought to be enjoined had been completely executed, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected. The case at bar comes within the rule announced in United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 308, 41 L. ed. 1007, 1016, 17 Sup. Ct. Rep. 540, and Boise City Irrig. & Land Co. v. Clark (C. C. App. 9th C.), 65 C. C. A. 399, 131 Fed. 415.
>
> In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question in-

volved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-terms orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress.

In United States v. Trans-Missouri Freight Asso., supra, the object of the suit was to obtain the judgment of the court on the legality of an agreement between railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: 'The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future. . . . Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commercement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the government has endeavored to procure by a judgment of the court under the provisions of the act of Congress above recited. The defendants cannot foreclose those rights, nor prevent the

assertion thereof by the government as a substantial trustee for the public under the act of Congress, by any such action has has been taken in this case.' And, referring to the agreement as one claimed by the government as illegal, it was further said: 'That question the government has the right to bring before the court and obtain its judgment thereof.' The interests there passed upon are no more of a public character than those involved in the order of the Interstate Commerce Commission in the case at bar, and there was no greater necessity for continuing a jurisdiction which had properly attached; and that the government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy, or terminate its questions.

In Boise City Irrig. & Land Co. v. Clark, supra, the period for which a municipal ordinance fixed a water rate expired pending the litigation as to its legality, and it was contended that the case had become moot. The court replied: 'But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.'

The motion to dismiss is denied.''

This matter involves important questions of governmental authority affecting the property rights of 160,000 stockholders. The right of stockholders to a review in this case should be decided beyond any question. Counsel for the Commission have set upon a course of practice to defeat this right by procedural maneuvers calculated to wear out opposition to the Commission's orders. Confronted by the clear right of review granted by Congress under Section 24, a party aggrieved must of necessity seek

redress in the United States Circuit Court; otherwise he could be confronted by the contention that he has not been diligent and has lost his right of review. This is particularly true since the Act clearly provides that the Circuit Court only has the jurisdiction to review. It will be noticed the Commission, in attempting to steer the controversy into the District Court, does not state that the order will there be reviewed, but only that the "order would be subject to examination." If the question of the Petitioners' right of review is not decided at this time they will be forced, under the penalty of losing their right of review, to proceed in the same manner again and again, and each time be confronted with a repetition of the same contentions now put forth by Counsel for the Commission. Certainly citizens have the right to a clarification of the procedure by which they may protect their property rights from infringement by a government agency.

2. As to the Motion to Defer.

In our Motion to Defer we set forth various facts which had occurred since the decision of the Circuit Court and the reasons why it was necessary to defer consideration of the matter until these facts could properly be brought upon the record. We made no attempt to argue the motion by a brief, since we considered the Respondents would agree this should be done in the interest of orderly procedure. The opposition to the motion by the Commission came as a surprise especially since they have seen fit to rely upon the changed facts to support a contention in opposition to our Petition for Certiorari.

The purpose of the Motion to Defer was to bring the modification of the order, and the compliance by Commonwealth with that order, upon the record so that the matter might be considered by the Court on all the existing facts. It is submitted that until these facts are properly brought upon the record the Court is not in position to consider

them, even in the manner in which the Commission seeks to use them; namely, as a basis for its contention of "mootness."

Another reason for the Motion to Defer was the changed position now adopted by the management. Commonwealth now agrees, as we have constantly urged, that the plan should be changed. The alterations proposed by the management are not entirely acceptable to our Petitioners, but they afford a basis from which a compliance with the requirements of the Holding Company Act may be worked out on a more equitable basis and to the satisfaction of these Petitioners. Should this much desired result be attained it would then be unnecessary for this Court to pass upon either this Petition for Certiorari or the more important matters presented by our Petition for Review. It would seem the Commission also should desire such a result and lend its offices to its attainment, rather than oppose a deferment.

As the matter now stands, either the matter should be deferred, to permit the additional facts to be brought upon the record, and the Petition for Certiorari then considered; or the Petition for Certiorari should be granted on the record as it now stands, with the matter ultimately remanded to the Circuit Court for the Third Circuit, with leave to amend the Petition for Review to bring the additional facts upon the record, and for a review thereon.

Respectfully submitted,

ALFRED J. SNYDER,
WILLIAM H. BRANTLEY, JR.,
ELIZABETH C. LOWNSBURY,
Attorneys for the Petitioners.
By ALFRED J. SNYDER.

December 20, 1945.